

Ellsberg Jury Out Months Pending High Court Ruling

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LOS ANGELES, Aug. 9—The eight women and four men chosen to try Daniel Ellsberg and Anthony Russo were told today that they must remain on call for at least two months, pending a Supreme Court decision on whether to consider a defense appeal over government wiretapping.

U.S. District Court Judge W. Matt Byrne Jr. promised the Pentagon Papers trial jury, as well as the five women and one man selected as alternate jurors, that he would bring them back to court "sometime in October" for further instructions.

He declined to rule on a defense motion to declare a mistrial and to discharge the jurors, lest they be subject to "prejudice and taint" from publicity in the intervening months.

Judge Byrne also renewed this warnings to the jurors, who were sworn into service on July 21 and who have not been sequestered, not to read or listen to anything about the case.

With a characteristic clash between the prosecution and defense over the mistrial motion and with a large dose of anticlimax, the controversial trial thus ended today before it had really begun.

There was uncertainty on all sides about when, if ever, it would resume.

The defense motion, produced as court convened this morning, was accompanied by an apparently unprecedented "waiver of double jeopardy" signed by Ellsberg and Russo, who are charged with espionage, conspiracy and theft of government property in connection with disclosure of the top secret Pentagon Papers.

They executed the waiver in light of the assertion last week by U.S. Solicitor General Erwin N. Griswold that "jeopardy attached" to the defendants as soon as the jury was sworn.

Since the Fifth Amendment to the Constitution bars putting anyone into jeopardy twice for the same alleged crimes, Griswold argued in Supreme Court, discharge of the jury might have "forever" deprived the federal government of a trial of the indictment against Ellsberg and Russo.

Chief defense counsel Leonard B. Boudin said in court today that the waiver was intended to prove that Ellsberg and Russo have "no desire to take advantage" of the wiretap dispute or "to avoid a trial on the merits."

In fact, Ellsberg later told a press conference in the federal courthouse here, "Unless the government drops the charges or the judge dismisses them, the only satisfactory solution is for Tony and me to be acquitted."

Scarcely concealing his personal disappointment over temporarily losing the opportunity to explain from the witness stand why he had released the secret Vietnam papers, Ellsberg nonetheless complained that "this case never should have been brought to trial. It is an abuse of the judicial process."

Russo said he would "spend the next few months working as hard as I can, doing as much as I can to end this war . . . and to oppose the re-election of President Nixon."

Ellsberg, who had actually planned a speaking tour to promote his recently published book, said he would do the same. Both defendants held back from any endorsement of Sen. George McGovern of South Dakota, the Democratic presidential nominee.

Earlier, during a 45-minute session before Judge Byrne, chief prosecutor David R. Nissen belittled the defense request for a mistrial and its waiver of double jeopardy.

The jury will be safe from taint by the prosecution, Nissen said, because "there will be no publicity about this case emanating from the government . . . but we do not know whether the defense will continue their propaganda barrage."

Joined by Leonard I. Weinless, Russo's chief counsel,

Boudin argued that to keep the jury "on leash"—the prosecution's term—would put "undue pressure" on the Supreme Court.

Byrne replied, however, that "the Supreme Court of the United States works very well under pressure. This won't deter them from doing what they think is right."

Saying he interpreted Justice William O. Douglas's order of July 29 halting the trial as a "stay of all proceedings," Byrne also declined to rule on a number of pretrial defense motions that are still pending.

Thus, it was still unclear whether the prosecution, in

order to obtain a conviction, would have to prove that Ellsberg and Russo intended to "harm" the United States by releasing the Pentagon Papers.

The real reason for the dispute over retaining the sworn jury was unspoken in court today.

Defense sources have made it clear privately that Ellsberg and Russo are concerned that the jurors already selected are mostly middle-aged and have professed to little knowledge of the Pentagon Papers and no strong opinions on American involvement in Southeast Asia.

If the jury were dismissed, a new panel would be drawn from a new list of veniremen that goes into effect in federal court here on Sept. 1 and will include 18-year-old voters for the first time. The defense believes that a jury selected from that group would be more favorable to its side.

Nissen attempted unsuccessfully today to have Judge Byrne tell the jurors, in effect, that the long delay in the trial was the defense's fault for asking "that the Supreme Court overturn the rulings of this court and the court of appeals" for the Ninth Circuit.

The prosecutors had also asked that the jurors be warned that the stay of the trial "could remain in effect for well over a year."

That eventuality could arise only if the Supreme Court agrees to consider the defense wiretap appeal, holds full argument on it and postpones its ruling beyond the end of its next regular term.

It is considered far more likely in legal circles that if the high court takes the case, the justices would put it on an expedited schedule and rule by the end of the year.

The Supreme Court could also announce on Oct. 9, the first decision day of its new term, that it will not take the case, thus freeing the Pentagon Papers trial to start up again in the fall.